Petition

81-683

FILED

SEP 28 1981

ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAYFAIR SUPERMARKETS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Donald Katz,
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JAY J. RICE
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QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit, in disagreeing with the Fourth and Fifth Circuits, err by holding that Federal District Courts are without jurisdiction to review the sanction imposed upon a food store which has been found to have violated Department of Agriculture Regulations with respect to Food Stamp redemptions under 7 USC §2023, which provides a trial de novo to "determine the validity of the questioned administrative action?"

2. Did the Third Circuit err in holding that the defense of entrapment is not available to the object of an administrative enforcement proceeding, where the penalties are quasi-criminal in effect?

3. Did the Third Circuit err in concluding that the prodecures employed by the Department of Agriculture against Petitioner, although in violation of the Department's own rules and regulations, were nevertheless proper?

4. Did the Third Circuit err in affirming the sanction imposed against Petitioner for seven food stamp violations totaling $42.03, a sanction that would cause a loss in revenue to Petitioner of approximately $120,000.00, would cause Petitioner to lay off a substantial number of employees, and would cause tremendous inconvenience to a substantial number of food stamp recipients?

5. Did the Third Circuit err in affirming the District Court's conclusion that there were no facts justifying a finding of entrapment?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981
No. _____

MAYFAIR SUPERMARKETS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States:

Mayfair Supermarkets, Inc.[1], the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 5, 1981.

1. Pursuant to Supreme Court Rule 28-1, please be advised that Mayfair Supermarkets, Inc. has no parent or affiliated corporation, and it has two subsidiary corporations, East & Houston Corporation and Jolen Bud Corporation.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The United States District Court opinion of the Honorable H. Lee Sarokin was delivered orally and is appended hereto. (A1 and A2).

The United States Court of Appeals for the Third Circuit rendered its decision without opinion.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

A judgment order affirming the judgment of the District Court was entered by the United States Court of Appeals for the Third Circuit on August 5, 1981 (A8).

Jurisdiction is conferred on the United States Supreme Court to review this judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The statutes involved herein are 7 USC §§2021 and 2023, set out at length in the appendix hereto (A11 and A12).

The informal regulations of the Food and Nutrition Service (FNS) of the Department of Agriculture are *F.N.S. Guidelines* 744-9, set out at length in the appendix hereto (A14 through A30).

STATEMENT OF THE CASE

Petitioner owns and operates a food store in Elizabeth, New Jersey, which has been authorized to participate in the Food Stamp Program pursuant to 7 USC §2011 *et seq.* since November, 1973.

Defendant, United States of America, administers the Food Stamp Program through the Department of Agriculture and is authorized to be sued under 7 USC §2022 whenever a participant in the Food Stamp program has been disqualified from participation in the program.

It is undisputed that it has consistently been Petitioner's policy to comply with the Department of Agriculture's regulations regarding acceptance of food stamps, published in 7 C.F.R. §2020 *et seq*. Furthermore, Petitioner's employees were trained in and knowledgeable of the food stamp regulations.

Prior to July, 1978, Petitioner received no reasonable notice that food stamp violations were occurring in its store. Department of Agriculture employees visited Petitioner's store seven times up to October, 1977, and no violations were found or reported.

Respondent claimed, based on the reports of an investigator, that three of Petitioner's cashiers committed seven violations of Food Stamp Regulations. As to the alleged violations, on each occasion, the investigator admitted that the cashier involved was aware of the Food Stamp Regulations, and tried to enforce them, but was pursuaded otherwise by the government's investigator himself. The cashiers would advise the investigator of the rule, but he would plead with the cashiers until they would redeem the food stamps for ineligible items. The investigator admitted that on two such occasions, there was no violation. The total amount of alleged violations is $42.03.

Respondent notified Petitioner of the charges by letter of August 25, 1978. Petitioner requested a hearing, prior to which respondent disqualified Petitioner's Elizabeth store from participating in the Food Stamp Program for one year. The Food Stamp Review Officer's

findings concur with this Statement of the Case presented so far. Nevertheless, the Review Officer imposed a 60-day sanction.

Petitioner filed a timely complaint seeking a trial de novo pursuant to 7 USC §2023. The District Court, Honorable H. Lee Sarokin, granted respondent's motion for summary judgment on October 14, 1980. The court concluded that as a matter of law, it had no authority to review the sanction imposed under 7 USC §2023, which provides in pertinent part:

> The court shall determine the validity of the questioned administrative action in issue.

The court further found that entrapment was not a defense because the case did not involve an actual criminal charge, but only an administrative violation with quasi-criminal penalties (PA1 and PA2).

Additionally, the court found that the agency's action was not arbitrary and capricious, despite that the sanction would cost Petitioner $120,000.00 in lost revenue for violations totaling $42.03, that the sanction would cause many of Petitioner's employees to be laid off, the tremendous inconvenience to the many elderly, disabled, and minority food stamp customers for whom Petitioner's store is the only reasonable accessible retail food store.

Petitioner filed a timely Notice of Appeal with the United States Court of Appeals, which affirmed the lower court's decision by Order entered August 5, 1981.

ARGUMENT

Point I

The Supreme Court should grant the Petition for Writ of Certiorari to resolve the split of opinions among six Circuit Courts of Appeals on this important question of federal court jurisdiction.

Of the six Circuit Courts of Appeals that have addressed the question of a Federal District Court's power to review the sanction imposed on a retail food store by the Department of Agriculture, three have held that the Courts are not to consider the validity of the sanction; three have held that 7 USC §2023 authorizes judicial review of the agency's sanction.

The Third Circuit in this case, and the Sixth and Seventh Circuits, have held judicial review precluded, *Martin v. United States*, 459 F.2d 300 (6th Cir. 1972); *Save More of Gary v. United States*, 442 F.2d 36 (7th Cir. 1971). On the other hand, the Fourth, Fifth, and Eighth Circuits have held that federal courts may inquire into whether the Department of Agriculture's sanction was arbitrary and capricious. *Studt v. United States*, 607 F.2d 1216 (8th Cir. 1978); *Goodman v. United States*, 518 F.2d 505 (5th Cir. 1975); *Cross v. United States*, 512 F.2d 1214 (4th Cir. 1975) (en banc) *aff'd on remand*, 538 F.2d 624 (4th Cir. 1976).

A split of opinion between the Circuit Courts of Appeals is clearly a grounds for granting a Petition for Writ of Certiorari. Sup. Ct. R. 19(1)(b).

Moreover, it is submitted that those courts which have ruled against extending Federal Court jurisdiction to sanctions have done so based upon a paucity of reasoning. The pertinent portion of the statute states:

> The suit in the United States District Court or State Court shall be a trial de novo by the court shall determine the validity of the questioned admin trative action in issue.

7 USC §2023. By some unexplained logic, those courts have ruled that "the questioned administrative action in issue" refers only to whether there was a violation, not to the sanction imposed by the agency. *Save More of Gary*, *supra*, 442 F.2d at 39; *Martin*, *supra*, 459 F.2d at 302. No reasons are given as to why the imposition of the sanction by the Department of Agriculture is not "administrative action."

The legislative history of the Food Stamp Act lends support to Petitioner's argument. As Judge Butzner's concurrence in *Welch v. U.S.*, 464 F.2d 682, 686 (4th Cir. 1972) points out:

> Senate Report No. 1124, 88th Cong. 2d Sess., reprinted at 2 U.S. Code Cong., & Ad. News pp. 3275, 3276 (1964), states "retailers . . . would have administrative and judicial appeals from . . . withdrawal of approval (to redeem stamps)." Again, the Report states, "The rights of retailers and wholesalers are carefully guarded under the provisions of this act." It continues, "This section (7 *U.S.C.A.* §2022) provides for administrative and judicial review of . . . the disqualification of such participating concern . . . " 2 U.S. Code Cong. & Ad. News at p. 3291 (1964). By linking administrative judicial review without suggesting that they differ in scope, the Report indicates that they are coextensive. Since the duration of disqualification may be reviewed administratively, the report illustrates that Congress intended that penalty may also be reviewed judicially.

Finally, as the courts that have found authorization for courts to review sanctions have indicated, such an interpretation is necessary to avoid constitutional problems, specifically a Fifth Amendment due process right to a hearing. *Cross*, *supra*, 512 F.2d at 1217.

For the foregoing reasons, the court should grant the Petition for Writ of Certiorari to review the decision of the Third Circuit Court of Appeals.

Point II

The Court should grant the Petition to determine if the defense of entrapment applies to this quasi-criminal proceeding.

If this were a criminal case, it is clear that entrapment would have been a major issue. The store's employees refused in each instance to honor the food stamps for ineligible items. Obviously they were not predisposed to commit the illegal acts. But under repeated pleading by the government's investigator, the employees allegedly violated the law (A34 through A37).

The courts below refused to recognize entrapment as a defense. While it is admitted that entrapment is generally applied in criminal cases, it is also certain that some state courts have allowed the defense in quasi-criminal situations, as in the revocation of a state-granted license. *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 508 P.2d 1121 (1973); *In re Horowitz*, 360 Ill. 313, 196 NE 208 (1935).

It is submitted that in a situation as the one before the court, where Petitioner has been accused of violating governmental regulations and faces a severe and punitive penalty if found "guilty," that the defense of entrapment should be applicable. This important question of Federal law is an appropriate reason for the granting of certiorari by the court.

Point III

The Court should grant the Petition to consider the validity of the Department of Agriculture's failure to follow its own regulations in imposing this sanction.

It is well settled that an agency must follow its regulations as well as statutory mandates. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Although Petitioner raised this argument in the trial court (and the Court of Appeals), the District Court's bench opinion did not squarely address the issue. Thus, this court should grant the present Petition and remand the matter for consideration of the sanction in light of the FNS regulations.

The *FNS Guidelines* 744-9 provide in pertinent part:

> E. *Thirty-or-sixty day disqualifications.* The choice between a thirty or sixty day disqualification will depend upon the extent of the violations committed, the responsibility of the store personnel involved, and the extent of the previous compliance action. Thirty or sixty day disqualifications normally will be assigned in the following situations:
>
> 1. The evidence shows that violations occurred due to poor supervision and general carelessness, even though FNS personnel made a significant compliance effort before the investigation to prevent violations.
>
> 2. The evidence is of such an unusually serious nature that a period of disqualification is called for, even though the violations were caused by poor supervision and general carelessness, and FNS personnel did not take significant compliance action prior to the investigation to prevent violations. EXAMPLES:

a) Large amounts of common grocery type ineligible items are sold and all attempts to buy such items are successful.

b) Large amounts of major non-grocery type items are sold.

3. The evidence is limited to only three successful clearly violative buys of ineligible items, and FNS personnel took significant compliance action before the investigation to prevent violations. EXCEPTION: This limitation on the number of successful buys does not preclude disqualification in cases where:

a) The violations are few in number, but extremely serious; or

b) The violations are basically of a technical nature, but further attempts to correct the situation through warnings appear completely fruitless, for example, despite numerous previous warnings by FNS personnel, the retailer continues to require food coupon customers to trade out the change due them.

Warning letters should be given, however, in the following situations:

F. *Warning Letters.* A warning letter will normally be the final determination in the following situations:

1. The evidence is the same as that described in either paragraph E 1 or 3 above, under 30- or 60-day disqualifications, but compliance action is either lacking or too limited to support a period of disqualification.

2. The evidence is limited to only one or two successful clearly violative buys of ineligible items.

3. The evidence clearly shows that violations occurred contrary to the retailer's policy.

4. The investigation discloses only minor violations, such as the return of an endorsed $1. coupon as change (PA28 through PA30).

The Food Stamp Review Officer made the following findings:

1. The violations did occur.

2. There was no store policy on the part of ownership or management to violate.

3. There was evidence of program compliance on two occasions.

4. Violations were due to acts of cashiers, not improper supervision on the part of management.

5. Everything possible was done to obtain compliance at the Newark Avenue store.

6. Plaintiff had an excellent compliance record over the years.

Plainly, these findings do not support a 60-day penalty according to the above-quoted regulations. Thus, the court should accept this Petition and remand for consideration of this important point of administrative law.

Point IV

The ruling below was unreasonable, arbitrary, and capricious.

If this court were to rule that the District Court is authorized to review the sanction imposed by the Department of Agriculture, it should be pointed out that the Department's ruling was in fact arbitrary and capricious.

Petitioner's store, because of its location, does approximately $15,000 in food stamp business per week. A

60-day suspension would result in a loss of at least $120,000 in revenue. This seems quite a severe penalty for a $42.03 violation which was found by the hearing officer not to be the fault of management, and in fact was the result of appressive action by the government.

Such a drastic loss of business would necessitate laying off many employees of Petitioner. Furthermore, many elderly, disabled and minority food stamp customers use this store, as it is the only one reasonably accessible to them. The disqualification of this store from the Food Stamp Program is a totally unreasonable, arbitrary, and capricious sanction, which will deprive the underprivileged members of the neighboring community of their essential right to purchase food, a fundamental human necessity. Disqualifying Petitioner's store would work a grave unjustice on these innocent people.

Clearly, weighing the nature and effect of the penalty against the severity of the alleged violation shows that the sanction is arbitrary and capricious.

Point V

The Court below erred in finding no facts supporting an entrapment defense.

The government's investigator detailed in the administrative record the efforts he needed to make to induce the alleged violations (PA34-37). Yet the trial judge did not even consider this evidence, presumably because of his finding that entrapment was not an available defense. Thus, it is pointed out that should this court wish to consider the applicability of entrapment in this situation, the record below supports the defense.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RAVIN, DAVIS & SWEET,
A Professional Corporation,
Attorneys for Petitioner,
Mayfair Supermarkets, Inc.,
Parkway Towers,
485 U.S. 1 South,
P.O. Box 219,
Woodbridge, New Jersey 07095

By: /s/ Donald Katz
DONALD KATZ

Dated: September 22, 1981

APPENDIX A

BENCH OPINION OF HONORABLE H. LEE SAROKIN, OCTOBER 21, 1980

(18) it has a right to review the sanctions.

THE COURT Do I have a right to remand for reconsideration of the sanctions?

MR. RICE: I think you do, just as you would have a right to review the sanction and change it.

MS. MAUCERI: I interrupted your question, do you have a right to remand for review?

THE COURT: Of the sanctions.

MS. MAUCERI: No. This is a trial de novo. That sanction stands because it has already gone through not only the disqualification person but it has already gone through administrative review. Plaintiff has exhausted its administrative remedy and the case is now before you.

THE COURT: I think I have heard enough. Thank you, Mr. Rice.

This is a motion for summary judgment brought by the defendent. The plaintiff clearly concedes that it was guilty of the violation which has been asserted against it. It asserts that it should have done a de novo trial on the theory and defense of entrapment. No case has been brought to the Court's attention which would support such a defense in this type of action nor based upon our independent research does it appear that such a case exists.

(19) In addition to that the only support for the claim of entrapment by necessity comes from the investigator, since the employees of the plaintiff have all acknowledged that they have no independent recollection of what took place on these particular occasions. Even

assuming that entrapment were a proper defense to be asserted in this type of matter the Court concludes upon a review of the investigator's statement in the record below, taking those statements as true, that they would not make out a case of entrapment.

As to the sanctions, again, the defendant urges that this Court has no jurisdiction to review the sanctions imposed by the administrative agency. That may be correct, but even if I were to conclude otherwise, my review of the sanctions imposed and the regulations referred to by Mr. Rice would lead me to the conclusion that the sanctions imposed were not arbitrary or capricious and were justified because of the nature of the violations, what led up to those violations, and under the applicable regulations. Therefore, since there is no genuine issue as to any material fact, the Court will grant the defendant's motion for summary judgment.

APPENDIX B

ADMINISTRATIVE REVIEW DECISION, JULY 27, 1979

EXHIBIT "A"

July 27, 1979

CERTIFIED MAIL — Return Receipt Requested

Mr. Jay J. Rice
Ravin, Davis & Sweet
Counsellors at Law
Executive Plaza — 10 Parsonage Road
Edison, New Jersey 08817

Dear Mr. Rice:

The following concerns your request for an administrative review of the decision of the Food Stamp Division disqualifying Mayfair Supermarkets, Inc., T/A Foodtown, 647 Newark Avenue, Elizabeth, New Jersey, from participation in the Food Stamp Program for a period of one year. In reaching a determination in this case, I have given careful consideration to the information you have submitted in support of your position that this period of disqualification should not become effective.

An investigation of Food Stamp activities at the above store during the period of June 1—July 13, 1979 revealed that on six separate occasions ineligible nonfood items were sold for Food Stamp coupons. Twenty-eight of 64 items purchased were ineligible, including paint, a percolator, paper towels, light bulbs, cleansers and detergents. Cash change was improperly returned at one sale. Clerks Barbara Fichner, Rosa Wolmers and Miriam Murphy were identified as cashiers.

These program violations were fully set forth in a Letter of Charges dated August 25, 1978. After giving

due consideration to Mr. Michael Shapiro's reply thereto, the Food Stamp Division issued a Notice of Determination on October 18, 1978 with a one year period of program disqualification.

You requested an administrative review and meeting re this decision. Such a meeting was held in your office on July 12, 1979 with Messrs. Robert Vignou and Michael Shapiro present. Information submitted at this meeting and in your previous correspondence may be summarized as follows.

It was stated that the cashiers in question had no specific knowledge of the alleged violations. If the violations did occur, it was through inadvertence or mistake. None of the cashiers were new employees. These cashiers, along with all cashiers in Mayfairs 39 stores, receive intensive training and continued instruction with respect to the handling of Food Stamps.

It was contended that there was no evidence that the violations could be attributed to store policy of either ownership or management. Mayfair employs a shopping service to police, among other things, adherence to Food Stamp Regulations. If any program violations are found immediate steps are taken, as was the case here, to prevent further violations. This is the first occasion that any charges have been brought against a Mayfair store since the inception of the Program in New Jersey.

Finally, it was stated that any period of disqualification would result in, not only a economic loss to Mayfair (the Elizabeth store redeems some $60,000 in coupons monthly), but aiso would work a serious hardship to recipients in the area. The Elizabeth store services an area where there are few, if any, comparable stores. Mayfair provides a semi-weekly bus service for low in-

come families living at locations where no public transportation is available.

It is my finding that the violations set forth in the charge letter did, in fact, occur. While I concur with you that there is no store policy on the part of ownership or management to violate, I also find that the said violations were willfully and deliberately committed by cashiers who were well aware of program requirements. The responsibility for these acts must rest with management.

The Elizabeth Mayfair store was authorized to participate in the program in November of 1973. In the three years prior to the dates of the violations five visits were made to the store by Food Stamp personnel. During at least two of these visits management was advised of the possibility of program violations occurring in the store. Warnings were issued that such violations might well lead to program disqualification. This was confirmed in writing on August 20, 1975 and October 26, 1977.

It is recognized that, to a degree, a temporary disqualification of a participating retailer causes economic hardship, as well as possible inconvenience to Food Stamp customers. However, if the program is to operate to the advantage of those families participating, it is essential that all program requirements be observed.

Again, it is my finding that the violations did occur. Considering the entire record and the circumstances set forth supra, a period of program disqualification must be considered fair and proper. However, in reaching a determination as to the length of this period, I am taking into consideration certain factors, including evidence of program compliance on occasions and the fact that I find no store policy to violate.

In so doing, it is my judgment that a sixty day period of disqualification will adequately serve the compliance

needs in this case rather than the one year period recommended. This sixty day disqualification shall begin thirty days after your receipt of this letter. An application for reauthorization may be submitted ten days prior to the termination of the disqualification.

Your attention is called to Section 14 of the Food Stamp Act and to Section 279.10 of the Regulations with respect to your right to a judicial review of my determination. Please note that if a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which the owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. The complaint must be filed within 30 days of your receipt of this letter. Early action is desirable if you wish to seek from the court a stay of the disqualification action, pending the court's review of the matter.

Very truly yours,

/s/ Marshall F. Spear
MARSHALL F. SPEAR
Food Stamp Review Officer
Administrative Review Staff

cc: Mr. Ramsey, Acting Director—Administrative Review Staff, Food Stamp Director, Robbinsville, New Jersey
Mr. Hornsby, Compliance Branch

APPENDIX C

DECISION OF REGIONAL DIRECTOR FOR THE FOOD STAMP PROGRAM WITH SUPPORTING EVIDENCE, OCTOBER 18, 1978

EXHIBIT "C"

UNITED STATES DEPARTMENT
OF AGRICULTURE
FOOD AND NUTRITION SERVICE

Mid-Atlantic Region, 1 Vahlsing Center
Robbinsville, NJ 08691

CERTIFIED MAIL — Return Receipt Requested

Mr. Vince Costantino, Manager
Mayfair Supermarkets, Inc. T/A Foodtown
647 Newark Avenue
Elizabeth, New Jersey 07208

Dear Mr. Costantino:

Administrative review and evaluation have been made of the information and evidence available to us relating to our letter of charges dated August 25, 1978, including Michael Shapiro's reply, to such letter. Based on the review of the information and evidence, and pursuant to Section 272.6 (a) of the Food Stamp Regulations, it is my determination as Regional Director, Food Stamp Program, Mid-Atlantic Region, Food and Nutrition Service, U.S. Department of Agriculture:

1. That you or your employees violated the regulations governing the Food Stamp Program, 7 C.F.R. 270-274, in the matter specified in the letter of charges dated August 25, 1978.

2. That Mayfair Supermarkets, Inc. T/A Foodtown, under the management of Vince Costantino, shall be

disqualified from the privilege of participation in the Food Stamp Program for a period of one year.

Therefore, you are hereby notified that Mayfair Supermarkets, Inc. T/A Foodtown, under the management of Vince Costantino, is disqualified from participation in the Food Stamp Program and authorization number 437526 is revoked effective ten calendar days from your receipt of this notice.

However, you may apply for reinstatement beginning ten days prior to the expiration of the one year period of disqualification. If your application is approved, you will be issued a new authorization number and card upon completion of your disqualification period.

Authorization card 1437526 and all posters, forms, and other official material relating to the program must be surrendered on the above effective date to Maurice McGrath, Officer-In-Charge, Food and Nutrition Service, USDA, 591 Summit Avenue, Room 610, Jersey City, New Jersey 07306.

Banks and wholesalers will be notified not to accept coupons from your store after the effective date of this order. Any acceptable coupons on hand at that time may be redeemed if they are presented to Maurice McGrath for examination within three days after the effective date.

This determination will be final unless you submit a timely request for review to the Food Stamp Review Officer, Administrative Review Staff, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250. Your request for review must be postmarked by midnight of the 10th calendar day after you receive this notice, in order to be considered timely. (If the 10th day of the period for requesting review falls on a

Saturday, Sunday, or legal holiday, a specified in Section 273.5 of the regulations, a request for review will be timely if it is postmarked the next day which is not a Saturday, Sunday, or legal holiday.) If a timely request for review is made, administrative action will be held in abeyance, as provided in Part 272.8 of the regulations, until a decision on your request has been made by the Food Stamp Review Officer. A copy of the regulations governing the Food Stamp Program is enclosed for your information in this regard.

This action is taken under the authority of Section 272.6 (a) of the regulations governing the Food Stamp Program.

This determination of disqualification from participation in the program shall not preclude the Department of Agriculture or any other agency or department of the United States from taking further action to collect any claim determined under the regulations governing the Food Stamp Program or under any other pertinent statutes or regulations, nor shall this determination preclude prosecution under any applicable penal statutes.

IN FUTURE CORRESPONDENCE PLEASE STATE YOUR FIRM'S NAME AND REFER TO THIS NUMBER: WA-01175.

Sincerely,

RALPH PICONE
Regional Director
Food Stamp Program

Attachment

cc: CERTIFIED MAIL — Return Receipt Requested
Mr. Michael Shapiro, Treasurer
Mayfair Supermarket, Inc.
681 Newark Avenue
Elizabeth, New Jersey 07208

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2736

MAYFAIR SUPERMARKETS, INC., A Corporation,
Appellant

vs.

UNITED STATES OF AMERICA

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT OF DISTRICT COURT, DATED AUGUST 5, 1981

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 79-02501

Submitted Under Third Circuit Rule 12(6)
August 5, 1981
Before: ALDISERT and WEIS, *Circuit Judges*, and
RE, CHIEF JUDGE.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the bench opinion of the district court by the Honorable H. Lee Sarokin, *Mayfair Super Markets, Inc. v. United States*, Civ. No. 79-2501 (D.N.J. Oct. 14, 1980), *reprinted in* Appendix to Appellant's Brief at 184-85a; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed, and that the stay imposed by consent order of the district court dated December 8, 1980, is dissolved.

Costs taxed against appellant.

BY THE COURT,

/s/ R. J. Aldisert
Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS, Clerk

DATED: Aug. 5, 1981

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT

District of New Jersey

Hon. H. Lee Sarokin
Civil Action No. 79-2501
ORDER

MAYFAIR SUPER MARKET, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

ORDER OF HONORABLE H. LEE SAROKIN GRANTING THE MOTION OF THE UNITED STATES OF AMERICA FOR SUMMARY JUDGMENT, OCTOBER 21, 1980

This matter being opened to the Court by William W. Robertson, United States Attorney for the District of New Jersey, Valerie F. Mauceri, Assistant United States Attorney appearing, attorneys for defendant, for an order for summary judgment in favor of defendant, and Jay J. Rice, Esquire, counsel for plaintiff appearing in opposition thereto; and the Court having considered the pleadings, Administrative Record and memoranda of law submitted by counsel; and the Court having heard oral argument thereon; and the Court having found that there is no material issue of genuine fact and the defendant is entitled to summary judgment as a matter of law;

and the Court having further found that the defense of entrapment does not apply to this case; and the Court having further found that it is without jurisdiction to review the 60-day period of disqualification, and even assuming that it had jurisdiction to review the period of disqualification, the period was not imposed in an arbitrary or capricious manner; accordingly,

It is on this day of , 1980,

ORDERED that summary judgment be entered in favor of the defendant, United States of America, without costs.

H. Lee Sarokin, Judge
United States District Court

APPENDIX E

TEXT OF 7 USC §2021
TEXT OF 7 USC §2023

7 USC §2021. Civil money penalties and disqualification of retail food stores and wholesale food concerns.

Any approved retail food store or wholesale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to $5,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households, on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter or the regulations issued pursuant to this chapter. Such disqualification shall be for such period of time as may be determined in accordance with regulations issued pursuant to this chapter.

7 USC §2023. Administrative and judicial review.

Whenever an application of a retail food store or wholesale food concern to participate in the food stamp program is denied pursuant to section 2018 of this title, or a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provisions of section 2021 of this title, or all or part of any claim of a retail food store or wholesale food concern is denied under the provisions of section 2022 of this title, or a claim against the State agency is stated pursuant to the provisions of section 2022 of this title, notice of such administrative action shall be issued to the retail food store, wholesale food concern, or State agency involved. Such notice shall be delivered by certified mail or personal service. If such store, concern, or State agency is aggrieved by such action, it may, in accordance with

regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store, concern or State agency fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such request is made by such store, concern, or State agency, as well as such other information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect thirty days after the date of the delivery or service of such final notice of determination. If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or sevice of the final notice of determination upon it, requesting the court to set aside such determination. The copy of the summons and complaint required to be deliverd to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as the Secretary may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of

such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

APPENDIX F

TEXT OF FNS GUIDELINES 744-9

ACTION BY: Food Stamp Division
Regional and Field Offices

FOOD STAMP PROGRAM
CRITERIA FOR FINAL DETERMINATIONS
IN OIG INVESTIGATIVE CASES

I PURPOSE

This Instruction:

A. Explains the factors to be considered in recommending and making final determinations in Office of the Inspector General (OIG) investigative cases, and

B. Lists and discusses these final determinations.

II GENERAL

The action taken against a retailer or wholesaler for violations revealed during an OIG investigation has important consequences. The choice between disqualifying a retailer and limiting the action to a warning is a very significant one.

The violating retailer is the person most directly affected by the action taken. Disqualification will mean not only a temporary loss of business, but also adverse publicity for the store. In addition, it may mean the permanent loss of his food stamp customers to other stores. Or, if he is highly dependent upon his food stamp business, disqualification may mean that he will be forced to close his store.

On the other hand, failure to disqualify may adversely affect other retailers in the vicinity, particularly if they have lost business because of the violations. If the violat-

ing retailer is not disqualified and continues to violate, his competitors may feel compelled to follow suit. In addition, others who were already violating may disregard the regulations more flagrantly if they see that violators are not being punished.

Finally, the success of the Food Stamp Program greatly depends upon making equitable decisions in violation cases. When necessary, retailers must be disqualified in order to protect the program from abuse. However, the need to disqualify must never obscure the need to treat retailers consistently and to have an adequate basis of evidence for the action. Disqualifying inconsistently or too readily can result in alienation of the food trade industry and public criticism of the Department for being arbitrary and harsh with violators. In addition, it may seriously undermine the continuing attempt to obtain voluntary compliance since it may lead retailers to believe that the Department itself has lost interest in the concept of voluntary compliance.

In sum retailers must be disqualified when necessary. But, just as importantly, the retailer must have been given a fair opportunity to abide by the regulations and there must be sufficient evidence to make a reasonable and fair determination which can be defended should the case go to review. The guidelines in this Instruction are designed to make sure that all aspects of a case are carefully examined with these points in mind.

III FACTORS CONSIDERED IN RECOMMENDING AND MAKING FINAL DETERMINATIONS

The analysis of each case shall be directed toward answering three major operations: (1) *The extent of program harm.* Are the violations resulting in diversions of food stamp funds, or are they technical infringements of the regulations? (2) *The reason for the violations.* Are the violations due to misunderstanding, carelessness, or store

policy? (3) *The adequacy of previous administrative action.* Did FNS personnel make a reasonable effort before the investigation to make the retailer aware of the regulations and his responsibilities? In addition, was the retailer warned about violations?

No two cases are exactly alike. Therefore, no guidelines can precisely cover all parts of every case. A measure of individual judgment will be needed in each cases analysis. The three major factors to be considered in analyzing a case are discussed below.

A. *Extent of Program Harm.* The extent of program harm resulting from the violations being studied may be determined by considering the following factors:

1. *Number of Violations.* The number of illegal transactions shown in the investigative report is an important indication of how widespread the violations are. The reviewer must consider not only the violations in which OIG investigative aides participated, but also the violations revealed as secondary evidence in the statements of recipients, store personnel, and others.

To be considered in making the final determination, secondary evidence must be from a first-hand source, i.e., the person making the statement must either have actually witnessed or participated in the violations. Secondary evidence will be given the same weight as evidence obtained by OIG investigative aides, as long as the evidence seems credible. Since no physical evidence usually exists to support secondary evidence, determining credibility will depend upon consideration of factors such as:

a. The number of persons who admit participating in or witnessing violations,

b. The reputed reliability of the persons making the statements, and

c. The amount of specific detail about the violations contained in the statements.

2. *Nature of the Violations.* Another major consideration in determining the extent of program harm is the nature of the violations which occurred. Technical violations, such as the acceptance of endorsed 50-cent coupons, will not be given as much weight as will violations which result in diversion of food stamp funds from their purpose of providing eligible food, such as the sale of ineligible items and the exchange of cash for coupons.

3. *Scope of Violations.* A third consideration is the scope of the violations, i.e., the amount of coupons, cash, excess due bills, etc., involved in illegal transactions, and the number and type of ineligible items sold. (See A 4 below for guidelines in evaluating ineligible items violations.) Generally the greater the scope of the violation, the more serious the violation will be considered.

4. *Evaluation Ineligible Item Violations.* To properly evaluate ineligible item violations, the reviewer must consider the following factors:

a. *Types of Ineligible Items.* To help the reviewer in his evaluation, ineligible items are divided into three types; marginal, common grocery, and major non-grocery types. The reviewer must carefully consider the types of ineligibles sold in order to determine the seriousness of the violations.

EXAMPLE: The sale of an electric mixer would be considered more serious than the sale of a box of detergent.

(1) *Marginal Ineligible Items* are items which can easily be mistaken for eligible items and sold for coupons through oversight.

EXAMPLES: Canned pet food or imported food products.

(2) *Common Grocery Type Ineligible Items* are easily identifiable ineligible items of low cost.

EXAMPLES: Cleaning products such as soap, or paper products such as toilet tissue.

(3) *Major Non-Grocery Type Ineligible Items* are alcoholic beverages and easily identifiable ineligible items of high cost.

EXAMPLES: Clothing, home furnishings, hardware, cartons of cigarettes, or alcoholic beverages.

b. *Comparing Numbers and Types of Ineligible and Eligible Items.* The reviewer must compare the number and type of ineligible items sold in each transaction to the number and type of eligible items sold. Such a comparison should enable the reviewer to judge whether the transaction was clearly violative or whether the ineligible items could easily have been sold without being noticed.

EXAMPLE: A transaction in which only two of twenty items sold were ineligible would not be considerd as serious as one in which over half the items sold were ineligible. In fact, the two ineligible items might not be considered at all in reaching a final determination if they were not of a serious nature and could easily be overlooked at the check stand.

NOTE: In counting the number of items sold in a transaction, the reviewer should bear in mind that items of the same type and brand are often sold in combination. In view of this, when several items of the same type and brand are sold in the same transaction, they normally will be counted as only one item. Thus, three bars of Ivory soap would count as one ineligible item, not three.

5. *Number of Clerks Involved.* In cases involving stores which employ numerous clerks, the number of clerks who participate in violations will have an important bearing in determining the extent of the violations. For example, if only one of five clerks was found violating, the violations would be considered less extensive and the case less serious than if all five clerks were found violating.

6. *Redemption Volume.* Some indication of the extent of program harm may be obtained by examining the amount of the store's redemptions and their reasonableness when compared to the redemptions of competing stores.

NOTE: The fact that a store is redeeming only a small amount of coupons will not *by itself* make a differnce in the consideration of a case, except in highly unusual circumstances. For example, if it appears that about the only coupon business ever done by the store resulted from the investigation, the normal criteria may be waived.

B. *Reason for the Violations.* The reason for the violations revealed by the investigation may be determined by considering the following factors:

1. *Refusals to Violate.* Any complete or partial refusals to violate the program must be carefully examined to determine whether or not reported violations were possibly a result of inadvertent error or misunderstanding. Particular attention should be paid to the store personnel and the types of attempted violations involved in the refusals, the extent of the refusals, and the pattern of the refusals.

EXAMPLE: A case in which the clerks sold ineligible items and the owner refused to do so would be considered less serious than a case in which the opposite oc-

curred. Likewise, a partial refusal generally will be given less weight than a complete refusal.

2. *Special Consideration for Partial Refusals to Sell Ineligible Items.* Partial refusals to sell ineligible items are often difficult to evaluate. The reviewer must make a judgment about each partial refusal, however, to determine whether it was a bonafide attempt to comply with the regulations, or only a device to limit the violations.

In evaluating partial refusals, the reviewer shall carefully examine the type and number of items sold and refused, and the number of times partial and complete refusals occurred. Also, the remarks of the clerks may be signifcant in this evaluation. In most cases, the benefit of the doubt should be to the retailer, and the partial refusal should be considered a true effort to obey the law. Only occasionally should the partial refusal be discounted, and then only when there is good reason for doing so. For example, a partial refusal may still be considered a clearly violative transaction if a sizable number of common grocery type ineligible items are sold, and the only items refused are of non-grocery type such as beer.

3. *Circumstances Surrounding Violations.* The context of the situation in which violations occurred must be considered to see whether the violations were committed as inadvertent errors, misunderstanding, favors, or store policy. The context must be considered even when the violations involve diversions of program funds such as the exchange of cash for coupons or the sale of alcoholic beverages.

EXAMPLE: The exchange of cash for coupons at par in small amounts as favors to the recipients, would be given less weight than the discounting of coupons by the retailer for his own profit. Also, the clerks may be profit-

ing from accepting coupons for cash without the knowledge of the owner or management.

4. *Store Policy.* The complete case record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy:

a. Substantial participation by the owner, responsible members of his family, or the management in the violations,

b. Admissions by the owner, management, or clerks that instructions were given to violate the program,

c. Physical proof, such as written instructions from the owner or management, indicating that violations were permitted as store policy.

d. A combination of violative evidence and previous compliance action which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that vilations were probably occurring in the store, and

e. Any other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them.

C. *The Adequacy of Previous Administrative Action.* For the purpose of this Instruction, administrative action is divided into two categories; (1) educational action, and (2) compliance action. Educational action is present to some degree in all cases. Compliance action is not present in all cases.

1. *Educational Action.* The reviewer must carefully evaluate all educational action taken by FNS personnel before the investigation to see if a reasonable effort was made to make the retailer aware of the regulations and

his responsibilities to abide by them. Such educational action may include:

a. Information given out before and during the original meeting with merchants in a designated Food Stamp Project Area,

b. Authorization meetings and interviews,

c. Educational sessions with store personnel,

d. Educational store visits,

e. General compliance letters explaining the program and regulations, and

f. Any other material distributed or action taken to help retailers know and meet program requirements.

2. *Compliance Action.* Compliance action is any action taken to confront the retailer with the possibility that violations are being committed in his store and cautioning him against further violations. Such action may be taken as a result of admitted or observed violations, rumors or complaints, unusually high or erratic redemptions, or general suspicion about the store.

The reviewer must carefully examine the record of compliance action to see if the retailer received clear and significant warning about violations before the investigation. Normally, all of the following factors must be present before complaince action will be considered *significant* and thereby make a differnce in the final determination.

a. There was a compliance store visit during which the retailer was confronted with the possibility of violations in the store, questioned about his understanding of the regulations, and cautioned;

b. A confirming or warning letter was sent as a follow-up to the visit; and

c. The action was taken not more than three years prior to the actual investigation, *or*, if the action was aimed primarily at technical violations such as the acceptance of loose $2 coupons, not more than one year prior to the actual investigation.

NOTE: In the event that there has been a change in management in the store since the compliance action was taken, special consideration shall be given to whether or not the owner or appropriate representative, such as a district manager, of the store was made aware of the action.

3. *Previous Periods of Disqualification*. Normally, previous periods of disqualification resulting from earlier OIG investigations will result in stronger final determinations.

IV CRITERIA FOR FINAL DETERMINATIONS

After the complete case record is examined in light of the three questions discussed in Section III, the most appropriate final determination listed below should be recommended or made for the case. As mentioned previously, any guidelines given for use in considering cases are necessarily imprecise. The reviewer should attempt to choose a determination which is both reasonable and consistent with previous determinations in similar cases. *It is highly important to review previous cases which are similar in nature and to compare the final determinations in them with the action selected for the present case.*

NOTE: To disqualify a retailer for the sale of ineligible items, there must be a minimum of three successful buys of such items, except in highly unusual situations.

A. *Three-Year Disqualifications*. The regulations governing the program state that a three-year disqualification is the maximum period which will be assigned.

Three-year disqualifications are reserved for unusually serious cases.

EXAMPLES:

1. A three-year disqualification will be assigned to a retailer who has been previously disqualified from the program for a substantial period and who has been reinvestigated and found to be violating the program seriously again.

2. A three-year disqualification will be assigned in any case involving flagrant violations which result in major diversions or food stamp funds, such as the fraudulent alteration of redemption certificates or the purchase of identification cards from recipients for the purpose of fraudulently obtaining bonus coupons.

B. *One-Year Disqualifications.* A one-year disqualification is normally the maximum period which will be assigned to a retailer not previously disqualified from the program. One-year disqualifications usually will be assigned in the following situations:

1. The evidence clearly shows tha the retailer, as a matter of store policy, is engaged in violations such as:

a. The discounting of coupons for cash, which may take the form of accepting coupons as repayment of cash loans with interest or other devices to exchange coupons for cash at a discount, or

b. The sale of ineligible items such as alcoholic beverages and other major non-grocery type items.

2. FNS personnel have taken significant compliance action to prevent violations, and the evidence clearly shows that the retailer is engaged in violations such as:

a. To a limited extent, the types of violations listed in B 1 under one-year disqualifications, or

b. Any violations which show a deliberate and widespread disregard for program regulations.

C. *Six-Month Disqualifications.* Six-month disqualfications will be assigned in the following situations:

1. The evidence is the same as that described in B 2 under one-year disqualifications, but compliance action is either lacking or too limited to support a one-year disqualification. The record should show, however, that a reasonable educational effort has been made by FNS personnel to make the retailer aware of the regulations and his responsibilities.

2. FNS personnel have taken significant compliance action to prevent violations, and the evidence clearly shows that the retailer, as a matter of store policy, is engaged in violations such as:

a. The sale of common grocery type ineligible items in amounts which tend to be found in a normal shopping basket, or

b. Any violations committed on the condition that recipients spend their coupons at the violating store.

D. *Ninety-Day Disqualifications.* Ninety-day disqualifications normally will be assigned in cases like those described in C 2 under six-month disqualifications, where compliance action in citing lacking or too limited to support a six-month disqualification. The record should show, however, that a reasonable educational effort has been made by FNS personnel to make the retailer aware of the regulations and his responsibilities.

E. *Thirty-or-Sixty-Day Disqualfiications.* The choice between a thirty or sixty-day disqualification will depend upon the extent of the violations committed, the responsibility of the store personnel involved, and the extent of the previous compliance action. Thirty- or

sixty-day disqualifications normally will be assigned in the following situations:

1. The evidence shows that violations occurred due to poor supervision and general carelessness, even though FNS personnel made a significant compliance effort before the investigation to prevent violations.

2. The evidence is of such an unusually serious nature that a period of disqualification is called for, even though the violations were caused by poor supervision and general carelessness, and FNS personnel did not take significant compliance action prior to the investigation to prevent violations. EXAMPLES:

a. Large amounts of common grocery type ineligible items are sold and all attempts to buy such items are successful.

b. Large amounts of major non-grocery type items are sold.

3. The evidence is limited to only three successful clearly violative buys of ineligible items, and FNS personnel took significant compliance action before the investigation to prevent violations. EXCEPTION: This limitation on the number of successful buys does not preclude disqualification in cases where:

a. The violations are few in number but extremely serious; or

b. The violations are basically of a technical nature, but further attempts to correct the situation through warnings appear completely fruitless, for example, despite numerous previous warnings by FNS personnel, the retailer continues to require food coupon customers to trade out the change due them.

F. *Warning Letters.* A warning letter will normally be the final determination in the following situations:

1. The evidence is the same as that described in either paragraph E 1 or 3, above, under 30- or 60-day disqualifications, but compliance action is either lacking or too limited to support a period of disqualification.

2. The evidence is limited to only one or two successful clearly violative buys of ineligible items.

3. The evidence clearly shows that violations occurred contrary to the retailer's policy.

-4. The investigation discloses only minor violations, such as the return of an endorsed $1 coupon as change.-

G. *Warning Letters and Requests for Reinvestigation.* Investigations which disclose little evidence but which indicate that widespread violations may be occurring will result in warning letters and requests for reinvestigation.

/s/ Gene P. Dickey
GENE P. DICKEY
Acting Deputy Administrator
for Program Operations

APPENDIX G

CERTIFICATION OF MICHAEL SHAPIRO

Michael Sharpiro, of full age, certified as follows:

1. I am the Vice President for Finance and Administration, of Mayfair Super Markets, Incorporated, T/A Foodtown, and am familiar with the facts surrounding the food stamp violations that allegedly occurred at the 647 Newark Avenue, Elizabeteh, New Jersey Foodtown Store.

2. On August 25, 1978, Mayfair Super Markets, Inc. was first notified by the United States Department of Agriculture Food and Nutrition Service, that there was reason to believe that 7 food stamp violations had occurred at the 647 Newark Avenue, Elizabeth, Foodtown store.

3. Immediately thereafter, Mayfair Supermarkets, Inc. investigated the charges and interviewed the three cashiers that were allegedly involved. The three cashiers, by written statement, averred that they did not have a record of the alleged violations, they did not knowingly accept food stamps in payment for any non-authorized items, and that they had been previously made aware of Mayfair Super Market's policy and procedures concerning the proper use and redemption of food stamps.

4. Prior to August 25, 1978, Mayfair Super Markets, Inc. had received no visits from United States Department of Agriculture, Food and Nutrition Service regarding alleged food stamps violations at the 647 Newark Avenue, Elizabeth, New Jersey, Foodtown store. A visit was made to said store by Food Stamp personnel during this time for the sole purpose of reviewing the high volume of food stamp redemption in the store.

5. Prior to August 25, 1978, Mayfair Super Markets, Inc. had received no visits from United States Department of Agriculture, Food and Nutrition Service personnel regarding instruction as to improving the procedures used by Mayfair Super Markets, Inc. in instructing its employees at the 647 Newark Avenue, Elizabeth, New Jersey, Foodtown store as to proper food stamp redemption procedures.

6. Prior to August 25, 1978, Mayfair Super Markets, Inc. received no letters or corespondence from the United States Department of Agriculture, Food and Nutrition Service for the 647 Newark Avenue, Elizabeth, New Jersey Foodtown store informing the former that there were alleged food stamp violations taking place at the aforesaid Foodtown store.

7. Mayfair Super Markets, Inc. did receive correspondence from the United States Department of Agriculture, Food Nutrition Service, regarding the 647 Newark Avenue, Elizabeth, New Jersey Foodtown store. This correspondence simply informed Mayfair Super Markets, Inc. that redemption of food stamps is high then that of other stores in the area. Mayfair Super Markets, Inc. investigated the aforesaid allegation by reviewing the same with the managing personnel of the Elizabeth store. The investigation disclosed that the high rate of food stamp redemption was due to the urban nature of the supermarket in question and the increased volume of business in general that had been generated by the Elizabeth store in the preceding few months.

8. Any alleged violation of food stamp regulations would be directly contrary to the expressed Company policy of Mayfair Super Markets, Inc. All employees of Mayfair Super Markets, Inc. are instructed as to the proper procedures for food stamp redemption. They are specifically instructed not to accept stamps for non-food

items and not to give cash as change in a food stamp coupon transaction.

9. The Elizabeth Foodtown store redeems approximately $15,000 a week in Food Stamps. A disqualification of said store would result in a loss of approximately $25,000 to $30,000 a week in sales, necessitating the layoff of approximately 10 employees and causing great inconvenience to the customers of the area who have come to rely on the high quality of Foodtown.

10. The Elizabeth Foodtown store has no prior Food Stamp violations.

11. The Mayfair Super Market food chain in general has no previous food stamp disqualifications in any of its stores.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MICHAEL SHAPIRO

APPENDIX H

UNITED STATES DEPARTMENT OF AGRICULTURE INTERNAL MEMO, OCTOBER 18, 1978

PRIMARY EVIDENCE

ATTEMPTS 8: COMPLETE SUCCESSES 6, PARTIAL REFUSALS N/A, COMPLETE REFUSALS 2.

DETAILS OF REFUSALS: On June 5, 1980 a clerk refused four common ineligible items when she had all the eligible items rung up she pointed to the ineligibles and told me that I had to have cash for them. She said that she might get into trouble if she sold those items for food stamps. In another buy this clerk sold ineligible items. On June 21, 1978, a clerk refused four items. She said, oh, you have food stamps, we have to separate these. I told her that I only had some change. She looked at the prices of the ineligible items and told me I would need about $9.00 cash. I told her that I only had change. She picked the items off the counter and put them behind.

INELIGIBLE ITEMS: 28 OUT OF 64 IN SUCCESSFUL BUYS.

TYPES OF INELIGIBLE ITEMS: Paint, percolator, paper and plastic products, health and beauty aids,. cleaning and laundry products, disposable diapers and light bulbs.

MAJOR NONGROCERY ITEMS: 3 (percolator $6.88 and two cans of paint $5.99 each) OVER 3 TRANSACTIONS.

CLERKS INVOLVED: Three clerks participated in the violative transactions.

OTHER VIOLATIONS: Cash as change was returned during one buy.

OTHER INFORMATION

STATEMENTS OF CLERKS DURING INVESTIGATION: On June 7, 1978 she had just the ineligibles rung up and said that I had to pay cash for them. I said that I didn't have enough cash with me. She thought for a moment, then bagged the ineligible items. She then told me that she would let me have it this time.

On June 23, 1978 — clerk — After it was all rung up, paid for and bagged and I was about to leave she pointed to the paper towels and said, "you're not supposed to get towels with food stamps." Then she turned and took care of the next customer.

On July 11, 1978 the clerk said, "Shh, you are not supposed to get these with food stamps", she had her hand on the paint.

On July 13, 1978 — She rang up the eligible items and started bagging them. I pointed to the other items and told her that those were mine also. She said she couldn't sell me those with food stamps. I said that she had sold them to me before. She said that she knew but she wasn't supposed to. I then told her that the only cash I had was the change in my pocket. I pulled the change out and showed her $.70 and told her that was all the cash I had with me that I could give her. At this point the woman in line behind me asked how long a box of Pampers would last. I turned and started talking to that woman. While I was talking I noticed that the clerk continued ringing up the rest of the items. The clerk didn't say anything else, she just bagged the items and I left.

SECONDARY EVIDENCE: N/A

CONFRONTATION & REPLY TO CHARGE LETTER: In reply to the charge letter, the vice-president

stated that it is the company's policy to adhere to the regulations. The employees involved in the buys were interviewed and all understood the regulations and stated the violations were an oversight. The company issued a warning to the employees. He also asked for a meeting. The normal form letter was issued.

BACKGROUND INFORMATION

AUTHORIZATION: November 13, 1973.

VISITS: Five (two educational visits on February 10, 1976 and May 20, 1976 and three compliance visits on August 6, 1975; February 18, 1977, NFA; and October 17, 1977).

COMPLIANCE LETTERS: Two letters, August 20, 1975 and October 26, 1977, were issued regarding high redemptions.

AVERAGE MONTHLY REDEMPTIONS: $60,113: 14% OF FOOD SALES.

ADP INFORMATION FOR MOST RECENT MONTH: August 1978.

Redemptions	Tract Average	Ratio	Differential
$57,521	2.8	13.3	375

ADP INFORMATION AT TIME OF REQUEST: January 1978.

Redemptions	Tract Average	Ratio	Differential
168	$59,382	5.1	13.7

RECOMMENDATION: FIELD Six Months. REGION One year.

JUSTIFICATION: The evidence revealed that six successful attempts were made to purchase ineligible items with two complete refusals. Two clerks made the refusals to sell the common ineligibles and a major ineligible. One of the clerks who refused previously sold ineligible items.

All of the successful buys were clearly violative since a comparison of the number and type of ineligible items sold and the comments made during the buys shows that the ineligible items could not have been sold without being noticed. In three different buys, major non-grocery items were purchased. Three clerks participated in the violative transactions. From the factors listed above, store policy to sell major and common ineligible items can be established.

Previous administrative action consisted of two educational visits, three compliance visits, and two confirming letters. Therefore, adequate compliance action was taken.

In accordance with the guidelines of FNS (FS) Instruction 744-9, Section IV, paragraph B-1-b, a one-year period of disqualification is warranted.

/s/ Connie S. Hensen
CONNIE S. HENSEN
Acting Chief
Coupon Use and Redemption Section
Food Stamp Program

Opposition

Office - Supreme Court, U.S.
FILED
DEC 4 1981
ALEXANDER

No. 81-683

In the Supreme Court of the United States

OCTOBER TERM, 1981

MAYFAIR SUPERMARKETS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MICHAEL KIMMEL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the decision of the Department of Agriculture disqualifying petitioner's food store from participating in the Food Stamp Program for a period of 60 days was arbitrary or capricious.

2. Whether the defense of entrapment is available in a civil enforcement action and, if so, whether the conduct of the Department's agents requires dismissal of this action.

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7 U.S.C. 2011 2

7 U.S.C. 2013(b) 2

7 U.S.C. 2013(c) 2

7 U.S.C. 2017 2

7 U.S.C. 2022 ..... 2, 4

Pub. L. No. 95-113, Section 1303, 91 Stat. 979, 7 U.S.C. (Supp. IV) 2011 note 2

7 C.F.R.:

Section 270.2(s) 2

Section 272.2(b) 2

Section 272.2(e) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-683

MAYFAIR SUPERMARKETS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. A10-A11) is unreported. The oral opinion of the district court (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1981. The petition for a writ of certiorari was filed on September 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant statutory provisions are set forth at Pet. App. A14-A16.[1]

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[1]Petitioner has annexed the disqualification and judicial review provisions of the current Act, the Food Stamp Act of 1977, rather than the provisions of the applicable Act, the Food Stamp Act of 1964. See note 2, *infra*. However, the two Acts do not differ materially with respect to these provisions.

STATEMENT

1. The Food Stamp Program was enacted as part of the Food Stamp Act of 1964, 7 U.S.C. 2011 *et seq.*, with the twin purposes of raising the nutrition levels for low-income households and strengthening our agricultural economy. 7 U.S.C. 2011.[2] The Secretary of Agriculture is responsible for administering the Act, which involves using state agencies to provide eligible households with the opportunity to purchase food stamps at a discount from the face value of the stamps. The Secretary has been given broad authority to promulgate regulations consistent with the purposes of the program. 7 U.S.C. 2013(b) and (c).

As part of his responsibility, the Secretary approves retail food stores for participation in the program, 7 U.S.C. 2017, and disqualifies program participants who have violated any provisions of the Act or its implementing regulations. 7 U.S.C. 2022. Two common grounds for disqualification are violations of 7 C.F.R. 272.2(b), which limits use of food stamp coupons to the purchase of "eligible food[s]"[3], and 7 C.F.R. 272.2(e), which disallows participants to use cash to make change for purchases made with coupons. Violations of these and other regulations are punishable by disqualification for reasonable periods of up to three years.

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[2]The Food Stamp Act was substantially amended in 1977. However, the enacting section provided that the new statute would not become effective until the Department of Agriculture adopted implementing regulations. Pub. L. No. 95-113, Section 1303, 91 Stat. 979, 7 U.S.C. (Supp. IV) 2011 note. These regulations were not adopted until September 22, 1978, and did not become effective until January 1, 1979. Accordingly, since the violations in this case occurred in 1978, the Food Stamp Act of 1964 was applicable and all citations herein are to that Act and the regulations in effect in 1978.

[3]"Eligible food[s]" are defined specifically as "any food or food product for human consumption except alcoholic beverages and tobacco * * *" 7 C.F.R. 270.2(s).

2. Petitioner owns a retail food store in Elizabethtown, New Jersey and has participated in the Food Stamp Program since November 1973 (C.A. App. 34a).[4] On several occasions during petitioner's involvement with the program, it was informed by the Department that its ratio of coupon redemptions to reported food sales at the Elizabethtown store was unusually high compared to other stores in the area (*id.* at 127a-129a; 134a-136a). When the high ratio persisted, the Department initiated an investigation to determine whether petitioner was complying with the Act and its regulations (Pet. App. A36).

On eight separate occasions during June and July 1978, an investigator visited petitioner's store to purchase items with food stamps (C.A. App. 97a-120a). During six of these trips, the investigator was able to purchase a total of 28 ineligible, non-food items, including some items (a percolator and cans of paint) that are deemed to be major violations of the Act (*id.* at 25a, 113a, 116a). In addition, on one occasion cash was given as change for a food stamp purchase (*id.* at 100a).

As a result of this investigation, the Food and Nutrition Service of the Department of Agriculture sent a charge letter to petitioner on August 25, 1978, notifying it of the violations (Pet. App. A3). The letter advised petitioner that it could submit any information, explanation or evidence pertaining to those charges. Petitioner responded with a letter in which it professed its adherence to the rules of the Food Stamp Program (*ibid.*).

The Regional Director of the Food and Nutrition Service subsequently notified petitioner that the violations specified in the letter of charges were found to have occurred and

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[4] "C.A. App." refers to the appendix filed in the court of appeals.

that the supermarket would be disqualified from the Program for a one-year period (Pet. App. A7-A8). The letter further advised petitioner that it could submit a request for administrative review of the decision (*id.* at A8-A9).

By letter of October 20, 1978, petitioner requested a review of the Regional Director's decision. The Food Stamp Review Officer conducted a review and sustained the decision to disqualify, but he reduced the disqualification period to 60 days (Pet. App. A5). The Review Officer found that major violations had in fact occurred and that petitioner was responsible for its employees' willful violations of the Program's requirements (*ibid.*). However, taking into account petitioner's history of compliance and the absence of a storewide policy to violate the Program, the Review Officer concluded that a 60-day disqualification was adequate to serve compliance needs (*id.* at A5-A6).

3. Petitioner sought judicial review of the administrative determination in the United States District Court for the District of New Jersey pursuant to 7 U.S.C. 2022. The court upheld the sanction, holding that the 60-day disqualification was not arbitrary or capricious (Pet. App. A2). The court further held that petitioner could not invoke the criminal law defense of entrapment in this civil action but that, even if the defense were available, petitioner could not make out a claim of entrapment on the facts of this case (*id.* at A1-A2).

The court of appeals affirmed for the reasons stated by the district court (Pet. App. A10-A11).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the courts of appeals are divided on the issue of whether there is judicial review of the sanction imposed by the Secretary under the Food Stamp Program. This case is not an appropriate one for resolving this issue, however, because the district court

did review the sanction as an alternative ground for decision and concluded that the 60-day disqualification was reasonable. See *Wolf* v. *United States*, No. 80-1575 (10th Cir. Oct. 28, 1981), slip op. 6.

The district court's decision on the reasonableness of the sanction is fact-bound and completely supported by the record. Petitioner's disqualification was based on six separate violations, including two major violations, by individuals who knew the rules of the Food Stamp Program (Pet. App. A5). As the district court stated, the sanction was "justified because of the nature of the violations, what led up to those violations, and under the applicable regulations" (*id.* at A2).[5]

2. Petitioner argues (Pet. 7, 11) that the investigation in this case involved entrapment by the Department's employees and therefore the administrative action should have been dismissed. Petitioner, however, has cited no case in which a court has upheld the defense of entrapment outside the criminal law context. See *Trey Packing, Inc.* v. *NLRB*, 405 F. 2d 334 (2d Cir. 1968). In any event, even assuming that entrapment could properly be a defense to an administrative proceeding, it would not apply here. The district court expressly found (Pet. App. A2) no basis for entrapment in the record. Petitioner has not identified any evidence that casts doubt on the validity of that finding.

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[5]Petitioner also argues (Pet. 8-10) that the 60-day sanction violated the Department's guidelines on sanctions (Pet. App. A17-A30). This is incorrect. First, petitioner misstates the function of these guidelines. They are not "hard and fast" rules. Instead, they anticipate "[a] measure of individual judgment" (*id.* at A19) in each case similar to that employed by the Review Officer. Second, petitioner points to no specific provision in the guidelines that prohibited the 60-day sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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